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Presentment Date: November 22, 2013
Presentment Time: 12:00 noon

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**
-----------------------------X
In re

Citicare, Inc., Chapter 11

Debtor. Case No. 13-11902-alg
------------------------------X

**DEBTOR'S MOTION FOR AN ORDER PURSUANT TO SECTIONS 365(A) AND 363(B) OF THE BANKRUPTCY CODE TO REJECT UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY AND TO ENTER INTO A NEW LEASE OF NONRESIDENTIAL REAL PROPERTY AT THE SAME LOCATION.**

TO: THE HONORABLE ALLAN L. GROPPER,
UNITED STATES BANKRUPTCY JUDGE

Citicare, Inc., the debtor and debtor-in-possession (the "Debtor"), files this motion (the "Motion") for an Order pursuant to 11 U.S.C. §§ 365(a) and 363(b) authorizing the Debtor to reject the Lease (defined herein) for the premises (the "Premises") located at 154 West 127th Street in the borough of Manhattan, City of New York and to enter into a new lease for a larger space located at the same location.

**CASE BACKGROUND.**

1. The Debtor filed its voluntary petition for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§101 et seq. (the "Bankruptcy Code") on June 9, 2013 (the "Petition

Date"). The Debtor continues to manage its property as a debtor and debtor-in-possession. No trustee or examiner has been appointed in this case. Also, no official committee of unsecured creditors has been appointed.

2. No trustee or examiner has been appointed in this case. Also, no official committee of unsecured creditors has been appointed.

3. The Debtor is a New York Corporation, and is a New York State Licensed Diagnostic and Treatment Center providing comprehensive primary and specialty care to medically underserved communities. The Debtor operates from its premises (the "Premises") located at 154 West 127th Street in the borough of Manhattan, City of New York.

4. The Debtor's emergent need to seek relief was necessitated by the Internal Revenue Service (the "IRS") levying the Debtor's accounts for tax liability. Additionally, the New York Department of Health ("NYDOPH") alleges that it is owed approximately $300,000 and, as a result, is withholding payment for the Debtor's services until the matter is resolved. The withholding of payment by the NYDOPH has had an adverse effect on the Debtor's business.

5. The failure of the Debtor's business would adversely affect the medically underserved community of which many of its residents rely upon the Debtor as their primary source of medical care.

6. The Debtor's management has been actively working to restructure its finances and identify an investor. Likewise, the Debtor has been actively negotiating with the IRS or NYDOPH to consensually resolve any outstanding issues.

**SUMMARY OF RELIEF REQUESTED.**

7. The Debtor seeks entry of an order authorizing it to reject the lease for the Premises and related agreements attached as Exhibit A to this Motion (collectively, the "Lease") and to enter into a new lease (the "New Lease") at the Premises attached as Exhibit B.

8. The Debtor is the tenant of the Premises pursuant to a Lease originally entered in with TWC Urban Realty, LLC the Landlord. The Lease commenced in July 2007 and runs for the period of 11 years and expires in 2018. The monthly base rent is currently $42,755.00 plus utilities and other customary charges.

9. The building (the Building") in which the Premises are located was purchased by 127th Street Properties LLC, (the "New Landlord"). The New Landlord has offered the Debtor to enter in to the New Lease for the entire Building.

10. The New Lease offers the Debtor increased space at a lower per square foot cost. The Debtor believes that the larger space will allow the Debtor to increase its patient base. Additionally, the increased space will allow the Debtor to sublet portions of the Premises to complimentary business such as a pharmacy and medical laboratories. This expansion is crucial to increasing the Debtor's

revenues and to restructuring Debtor.

11. Below are some of the key terms and benefits of the New Lease:

- Debtor remains the master tenant;
- reduces the cost from $38.78 per square foot triple net lease to $35 per square foot triple net;
- extends the tenancy 15 years until 2033.
- allows Debtor to sublet portions of the Premises to tenants who will provide complimentary services; and
- increases the Premises from 8,000 to 20,000 square feet.

**GROUNDS FOR RELIEF AND JURISDICTION**

12. This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

13. The statutory grounds for the relief sought are section 365(a) of the Bankruptcy Code, which permits a debtor-in-possession to assume an executory contract, and section 363(b)(1) of the Bankruptcy Code, which authorizes a debtor-in-possession to use property of the estate other than in the ordinary course of business after notice and hearing.

14. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession "subject to the court's

approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a).

15. Under section 365 of the Bankruptcy Code, the assumption of an executory contract is subject to the "business judgment test." *In Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 318 U.S. 523, 550 (1943), the Supreme Court stated "[T]he questions whether a lease should be rejected and if not on what terms it should be assumed is one of business judgment." *See also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524 (1984) (stating that the business judgment standard applies to the rejection of executory contracts with the exception of collective bargaining agreements). The business-judgment test is not a strict standard and merely requires a showing that either assumption or rejection of a contract will benefit the debtors' estate. *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993); *see Lubrizol Enter., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1047 (4th Cir. 1985) ("Transposed to the bankruptcy context [from corporate litigation], the [business judgment] rule . . . requires that the decision be accepted by courts unless it is shown that the bankrupt's decision was one taken in bad faith or in gross abuse of the bankrupt's retained business discretion.")

16. 11 U.S.C. § 363(b)(1) provides that a Debtor "may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

17. Similar to the standard applied in approving the assumption/rejection of a lease under § 365(a), courts apply the business judgment standard. *See In re Chateaugay Corp.*, 973 F.2d 141, 144-45 (2d Cir. 1992) & *Comm. of Equity Sec. Holders v. Lionel Corp.* (In re Lionel Corp.), 722 F.2d 1063, 1072 (2d Cir. 1983); *see also In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 154-55 (Bankr. D. Del. 1999).

18. Here, as demonstrated, the New Lease is crucial to the reorganization of Debtor's business. Likewise, if the Debtor sells the business as an ongoing concern the New Lease is a critical asset for the sale. The New Lease does not expire until 2033.

**WHEREFORE**, the Debtor respectfully requests that the Court enter an order, substantially in the form of the proposed Order submitted with this Motion, granting the relief sought herein, and granting such other and further relief as is just and proper.

Dated: New York, New York
October 28, 2013

/s/ ***Gabriel Del Virginia***
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***Citicare, Inc.,***
***Debtor and Debtor in Possession***
***/s/ Silva Umukoro***
Silva Umukoro
**President**

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**Citicare, Inc.,** **Chapter 11**

**Debtor.** **Case No. 13-11902-alg**
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**DECLARATION OF SILVA UMUKORO IN SUPPORT OF DEBTOR'S MOTION PURSUANT TO SECTIONS 365(A) AND 363(B) OF THE BANKRUPTCY CODE TO REJECT UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY AND TO ENTER INTO A NEW LEASE OF NONRESIDENTIAL REAL PROPERTY AT THE SAME LOCATION.**

Silva Umukoro, pursuant to 28 U.S.C. § 1746, declares and respectfully says: [1]

I am the president of Citicare, Inc., the above-captioned debtor and debtor-in-possession (the "Debtor"), and I am familiar with the Debtor's business and financial affairs. I submit this declaration in support of the Motion for an Order Authorizing the Debtor to reject the Lease (defined herein) for the premises Premises located at 154 West 127th Street in the borough of Manhattan, City of New York and to enter into a new

[1] Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

lease for a larger space located at the same location.

1.In my business judgment the rejection of the Lease and entry into the New Lease is critical to the Debtor's successful reorganization

2. The New Lease offers the Debtor increased space at a lower per square foot cost. The Debtor believes that the larger space will allow the Debtor to increase its patient base. Additionally, the increased space will allow the Debtor to sublet portions of the Premises to complimentary business such as a pharmacy and medical laboratories. This expansion is crucial to increasing the Debtor's revenues and to restructuring Debtor.

3. Below are some of the key terms and benefits of the New Lease:

- Debtor remains the master tenant;
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- allows Debtor to sublet portions of the Premises to tenants who will provide complimentary services; and
- increases the Premises from 8,000 to 20,000 square feet.

I hereby declare, pursuant to 28 U.S.C. §1746 that the foregoing is true to the best of my knowledge, information and belief.

Dated: October 28, 2013
New York, New York

***Citicare, Inc.,***
***Debtor and Debtor in Possession***
***/s/ Silva Umukoro***
Silva Umukoro
**President**

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New York, New York

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***/s/ Silva Umukoro***
Silva Umukoro
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